The Honorable Karen Donohue
Hearing Date: June 6, 2025
With Oral Argument

SUPERIOR COURT OF WASHINGTON IN AND FOR KING COUNTY

IN RE FUNKO, INC. SECURITIES LITIGATION,	No. 17-2-29838-7 SEA (Consol. with Nos. 18-2-01264-3 SEA, 18-2-01582-1 SEA, 18-2-02535-4 SEA, 18-2-08153-0 SEA, 18-2-12229-5 SEA, and 18-2-14811-1 SEA) CLASS ACTION **CLASS REPRESENTATIVES' MOTION FOR FINAL APPROVAL OF SETTLEMENT AND APPROVAL OF PLAN OF ALLOCATION OF SETTLEMENT PROCEEDS**

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I. MOTION

Class Representatives Robert Lowinger, The Ronald and Maxine Linde Foundation, and Carl Berkelhammer (collectively, "Class Representatives") hereby move this Court for an Order pursuant to Superior Court Civil Rule 23: (1) granting final approval of the proposed class action settlement reached with defendants, Funko, Inc. ("Funko"), Brian Mariotti, Russell Nickel, Charles Denson, and Diane Irvine, who serve or served as Funko's Officers and Directors (collectively, "Funko Defendants"), private equity firms ACON Investments, L.L.C. ("ACON"), ACON Funko Manager, L.L.C. ("ACON Funko Manager"), ACON Funko Investors, L.L.C. ("ACON Funko Investors"), ACON Funko Investors Holdings I, L.L.C. ("ACON Funko Investors Holdings I"), ACON Equity GenPar, L.L.C. ("ACON Equity GenPar") together with Ken Brotman, Gino Dellomo, and Adam Kriger who served as their officers and directors (collectively, "ACON Defendants"), Fundamental Capital, LLC ("Fundamental") and Fundamental Capital Partners, LLC ("Fundamental Capital Partners"), together with Richard McNally, who served as director and member of Fundamental's board (collectively, "Fundamental Defendants"), and underwriters Goldman Sachs & Co. L.L.C., J.P. Morgan Securities LLC, Merrill Lynch, Pierce, Fenner & Smith Incorporated, Piper Jaffray & Co., Jefferies LLC, Stifel, Nicolaus & Company, Incorporated, BMO Capital Markets Corp., and SunTrust Robinson Humphrey, Inc. (n/k/a Truist Securities, Inc.) (collectively "Underwriter Defendants", and together with Funko Defendants, ACON Defendants, and Fundamental Defendants, "Defendants") as set forth in the Stipulation of Settlement, dated February 7, 2025 (the "Settlement"); and (2) approving the proposed Plan of Allocation.

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II. MEMORANDUM OF AUTHORITIES

A. Introduction

Pursuant to the terms of the Settlement, Defendants have agreed to pay or cause to be paid $14.75 million in cash for the benefit of the Class. *See* Jaconette Decl., ¶2.[1] This Settlement is the result of more than six years of hard-fought litigation and arm's-length negotiations between the Parties with the assistance of an experienced mediator, Michelle Yoshida of Phillips ADR ("Mediator"). *Id.*, ¶10.

The Settlement is an excellent result for the Class, especially considering the risk of a much smaller recovery—or no recovery at all—if the Action were to proceed through summary judgment, trial, and likely appeals. During the course of the Action, Class Representatives' Counsel conducted a comprehensive investigation, undertook significant motion practice (including successfully obtaining reversal on appeal of an order granting Defendants' motion to dismiss), obtained certification of the Class, reviewed and analyzed more than 1.2 million pages of documents produced by Defendants and third parties, evaluated the value of the claims asserted with the assistance of a financial expert, Bjorn I. Steinholt, CFA, and meaningfully assessed the likelihood of success in further proceedings and at trial. The Parties also participated in extensive settlement negotiations conducted with the Mediator, where the strengths and weaknesses of the Parties' respective positions were explored. Class Representatives and Class Representatives' Counsel, therefore, had sufficient information to make an informed decision regarding the proposed Settlement. *Id.*, ¶63.

[1] "Class" means all persons who purchased or otherwise acquired common stock pursuant to or traceable to the Registration Statement and Prospectus issued in connection with Funko, Inc.'s ("Funko") November 1, 2017 Initial Public Offering, excluding Defendants, the officers, directors, and affiliates of Defendants, members of their immediate families, their legal representatives, heirs, successors, or assigns, and any entity in which Defendants have or had a controlling interest, as well as those Persons who timely and validly request exclusion from the Class.

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The Claims Administrator, A.B. Data, Ltd. ("A.B. Data"), implemented the Court-approved notice plan and successfully delivered, by email or First-Class Mail, the Notice and Proof of Claim ("Claim Package") to all potential Class members who could be identified with reasonable effort and posted notice on www.FunkoSecuritiesSettlement.com (the "Website") and published the Summary Notice on *The Wall Street Journal*, and a national newswire service, *PR Newswire*, within the time period specified by the Court. *See* Cavanugh Decl., ¶12. Not a single Class member has objected to the Settlement or sought exclusion from the Class. *Id.*, ¶17.[2]

The Settlement is fair, reasonable, and adequate in all respects. Likewise, the proposed Plan of Allocation equitably distributes the Net Settlement Fund, on a *pro rata* basis, to Authorized Claimants. Accordingly, Class Representatives respectfully ask the Court to grant final approval of the Settlement by: (1) finding that the Settlement and Plan of Allocation are fair, adequate, and reasonable; and (2) determining that adequate notice was provided to the Class by the Claims Administrator.[3]

B. Relevant Factual and Procedural History

1. This Action.

This certified class action alleges strict liability and negligence claims under Sections 11, 12(a)(2), and 15 of the Securities Act of 1933 ("Securities Act") against Defendants. The Action arises from alleged misstatements and omissions of material fact in the Registration Statement and Prospectus ("Offering Documents") issued in connection with Funko's November 1, 2017, initial public offering ("IPO").

Plaintiffs allege that the Registration Statement and Prospectus (the "Offering Documents") for Funko's November 1, 2017, IPO contained false or misleading statements

[2] The deadline to object or opt out is May 16, 2025; should any objections be timely filed Class Representatives' Counsel will address them in their reply brief.

[3] Class Representatives' Counsel's memorandum in support of their request for an award of attorneys' fees and expenses and awards to Class Representatives pursuant to 15 U.S.C. §77z-1(a)(4) is submitted concurrently herewith.

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about: Funko's alleged reliance on "channel stuffing" to boost its sales revenue, its ability to track excess and obsolete inventory, the value of its intangible assets, including its intellectual property, and the risks of problems related to inventory management and financial prospects that allegedly had already occurred. The Complaint alleges that shortly after the offering was declared effective, *Bloomberg* published an article questioning certain representations in Funko's Offering Documents, after which the company's shares traded at between $6 and $7, well below the $12 IPO price. Defendants have denied, and continue to deny, Class Representatives' allegations and claims. *See* First Am. Consolidated Compl. for Violations of the Securities Act of 1933 ("FACC"), ECF No. 77; Notice of Pendency of Class Action, Proposed Settlement, & Mot. for Att'ys' Fees & Expenses, ECF No. 424 at Ex. A-1.

2. Procedural History.

To avoid repetition, the Court is respectfully referred to Section II of the Declaration of James I. Jaconette in Support of Class Representatives' Unopposed Motion for Final Approval of Settlement ("Jaconette Declaration") for a full recitation of the procedural history of the case and the efforts of Class Representatives' Counsel.

3. The Class.

On November 6, 2023, the Court certified the following Class:

> All persons who purchased or otherwise acquired common stock pursuant to or traceable to the Registration Statement and Prospectus issued in connection with Funko, Inc.'s November 1, 2017, Initial Public Offering. Excluded from the Class are Defendants; the officers, directors, and affiliates of Defendants; members of their immediate families; their legal representatives, heirs, successors, or assigns, and any entity in which Defendants have or had a controlling interest.

Order Class Cert. at p. 2, ECF No. 230. The Court also found that all elements of Superior Court Civil Rule (CR) 23 were satisfied in granting Class Representatives' Motion for Class Certification. *Id.* at 1–2.

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4. Notice to the Class.

In its Preliminary Approval Order, the Court found that Plaintiffs' proposed notices and notice program were procedurally and substantively the best notice practicable and satisfied due process requirements. ECF No. 425, ¶9.

The Court approved the claims administrator, A.B. Data, "to supervise and administer the notice procedure in connection with the proposed Settlement as well as the processing of Proofs of Claim." *Id.*, ¶5.

A.B. Data has timely completed the required Notice Plan by mail and internet, and has otherwise complied with the Court's requirements in creating a settlement website and providing public notice of the Settlement. *See* Cavanaugh Decl., ¶¶14–18.

C. Argument in Support of Final Approval

1. The Settlement Is Fair, Adequate, and Reasonable.

Superior Court Civil Rule 23 requires judicial approval of all class action settlements. CR 23(e). A class representative must take three steps in order to obtain such approval. *First*, the class representative must obtain preliminary approval of the proposed settlement, including permission to provide notice of the settlement to the class, deadlines for class members to object to the settlement or withdraw from the class, and a schedule for a settlement fairness hearing and certain other relevant dates. *See Pickett v. Holland Am. Line-Westours, Inc.*, 145 Wn.2d 178, 186 (Wash. 2001); *Deien v. Seattle City Light*, 26 Wn. App. 2d 57, 61, 527 P.3d 102 (Wash. Ct. App. 2023). *Second*, the class representative must disseminate notice to class members informing them of the proposed settlement and their right to object. *Pickett*, 145 Wn.2d at 186; *Summers v. Sea Mar Cmty. Health Ctrs.*, 29 Wn. App. 2d 476, 491–99, 541 P.3d 381 (Wash. Ct. App. 2024), *review denied sub nom. Barnes v. Sea Mar Cmty. Health Ctrs.*, 3 Wn.3d 1002, 549 P.3d 1002 (Wash. 2024). *Third*, the class representative must obtain final approval of the proposed settlement at a settlement fairness hearing, during which the court considers the fairness,

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adequacy, and reasonableness of the settlement. *Pickett*, 145 Wn.2d at 186; *Deien*, 26 Wn. App. 2d at 62. The first two steps have been completed.

In determining whether a settlement is fair, reasonable, and adequate, Washington courts generally consider the following factors: "the likelihood of success by plaintiffs; the amount of discovery or evidence; the settlement terms and conditions; recommendations and experience of counsel; future expense and likely duration of litigation; recommendation of neutral parties, if any; number of objectors and nature of objectors; and the presence of good faith and the absence of collusion." *Pickett*, 145 Wn.2d at 188–89. The list is not exhaustive and "[t]he relative degree of importance to be attached to any particular factor will depend upon and be dictated by the nature of the claim(s) advanced, the type(s) of relief sought, and the unique facts and circumstances presented by each individual case." *Id*. at 189 (citation omitted).

Approval of class action settlements is considered against the backdrop of Washington's well-established policy favoring compromise over litigation. *See Am. Safety Cas. Ins. Co. v. City of Olympia*, 162 Wn.2d 762, 772, 174 P.3d 54 (Wash. 2007) ("Washington law strongly favors the public policy of settlement over litigation."); *City of Seattle v. Blume*, 134 Wn.2d 243, 258, 947 P.2d 223 (Wash. 1997) ("[T]he express public policy of this state . . . strongly encourages settlement."). Indeed, in the class action context, the court's review "must be limited to the extent necessary to reach a reasoned judgment that the agreement is not the product of fraud or overreaching by, or collusion between, the negotiating parties, and that the settlement, taken as a whole, is fair, reasonable and adequate to all concerned." *Pickett*, 145 Wn.2d at 189 (citation omitted). Each of the *Pickett* factors are met here.

a. Class Representatives' Likelihood of Success Supports Final Approval.

Class Representatives firmly believe in the strength of their claims and their ability to establish liability in this case. However, success in this Action was far from certain, as Defendants vigorously and firmly disputed the falsity and materiality of the challenged statements, argued

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that the Offering Documents warned of the very risks that Class Representatives alleged were misstated and omitted, and asserted that the corrective disclosure at issue here was not in fact corrective of any prior alleged misstatement or omission. These issues would have been heavily disputed throughout the remainder of the Action and, should Defendants have prevailed on any of these issues at summary judgment or trial, the Class would have recovered nothing.

Furthermore, Class Representatives' burden at summary judgment and trial would also have required expert testimony on industry-specific issues and damages. Even with the most competent experts in these fields, there could be no guarantee that Class Representatives would prevail on liability and damages. Defendants' experts, who would no doubt be well-credentialed, would likely present opinions designed to establish affirmative defenses such as negative causation, undermine Class Representatives' ability to demonstrate liability, and mitigate or even eliminate damages. Accordingly, Class Representatives' likelihood of success in this Action supports final approval of the Settlement.

b. The Settlement Terms and Conditions Support Final Approval.

The Settlement, which provides the Class with a large cash benefit, is an excellent result for Class members. Defendants have agreed to pay $14.75 million, which, after deducting notice and administration costs and expenses, attorneys' fees and expenses, and awards to the Class Representatives, will be distributed, *pro rata* among Class members who file approved claims. *See* Jaconette Decl., ¶3.

Based on accepted damages models the recovery in this Action expressed as a percentage of damages ranges from 49% to 32%, with a 39% recovery based on the average of the damages range. Indeed, that percentage recovery is significantly higher than the median Securities Act class action settlement as a percentage of statutory damages reported nationally.[4] *Id.*, ¶62. In Class

[4] *See* Cornerstone Research, *Securities Class Action Settlements: 2023 Review and Analysis* (2024), at 8, https://www.cornerstone.com/wp-content/uploads/2024/03/Securities-Class-Action-Settlements-2023-Review-and-Analysis.pdf (analyzing settlements from 2014-2023

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Representatives' view, the Settlement acknowledges the merit of the claims asserted and reasonably weighs their likelihood of success in further proceedings and at trial, as well as the alleged damages flowing from the alleged securities law violations. *Id.*, ¶63. Based on the above, the Settlement terms and conditions support final approval.

c. The Amount of Discovery and Evidence Support Final Approval.

As detailed in the Jaconette Declaration, this Settlement is the result of years-long, hard-fought litigation, in which extensive discovery was completed and multiple Court orders were entered over discovery disputes. *Id.* § II. Additionally, Plaintiffs produced discovery to Defendants and Class Representatives' Counsel reviewed over 245,000 documents produced by third parties and Defendants. *Id.*, ¶38. In total, all Parties, as well as third parties, produced over 245,000 documents (totaling over 1.2 million pages) in the Action. *Id.* Furthermore, counsel for both sides sent out numerous requests for productions, and heavily litigated for years on multiple heavily contested motions relating to discovery issues before the Settlement agreement was reached. *Id.*, ¶32–38. This is not an Action in which discovery was lacking or evidence was not apparent, and thus, this factor also supports final approval of the Settlement.

d. The Positive Recommendation and Extensive Experience of Counsel Support Final Approval.

Class actions are inherently complex, and class action settlements help to curtail the cost, delays, and other problems associated with complex litigation. *See, e.g.*, *In re Syncor ERISA Litig.*, 516 F.3d 1095, 1101 (9th Cir. 2008) ("[T]here is a strong judicial policy that favors settlements, particularly where complex class action litigation is concerned.").[5]

Class Representatives' Counsel have carefully considered and evaluated the likelihood of prevailing and the risk, expense, and duration of continued litigation, and have concluded that

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and concluding the median recovery in securities class action settlements involving Section 11 and/or Section 12(a)(2) claims is only 7.5%).

[5] CR 23 is "identical to its federal counterpart, Fed. R. Civ. P. 23, and thus, federal cases interpreting the analogous federal provisions are highly persuasive." *Pickett*, 145 Wn. 2d at 188.

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the Settlement is fair, reasonable, adequate, and in the best interest of the Class. *Pickett*, 145 Wn. 2d at 192. Counsel's support of the Settlement further evidences its reasonableness. *Id.* at 200; *see also Deien*, 26 Wn. App. 2d at 68 ("[G]iven class counsel's skill and experience, counsel's support of the settlement was entitled to great weight."). Further, as previously noted, counsel in this case "are qualified to conduct this class action," and "will fairly and adequately represent the interests of the Class." Order Class Cert. at p. 2, ECF No. 230. *See also* Declaration of James I. Jaconette Filed on Behalf of Robbins Geller Rudman & Dowd LLP, Ex. D; Declaration of Juli E. Farris Filed on Behalf of Keller Rohrback L.L.P., Ex. C; Aaron L. Brody Filed on Behalf of Stull, Stull & Brody, Ex. C; Thomas L. Laughlin, IV Filed on Behalf of Scott+Scott Attorneys at Law LLP, Ex. C ("firm résumés").

e. The Future Expense and Likely Duration of Litigation Support Final Approval.

As discussed above, Class Representatives' burden at summary judgment and trial would have required expert testimony on liability and damages. Further, even expert testimony could not guarantee the Class would prevail on liability and damages as Defendants would also have brought forth expert testimony from their own well-credentialed experts, which would challenge the Class's ability to demonstrate liability, and mitigate or even portend to eliminate damages.

Before the Parties agreed to enter into this proposed Settlement, Class Representatives' Counsel was preparing for fact depositions, and had sent out numerous notices of deposition to various defense and third party witnesses, with extensive expert discovery and dispositive motions anticipated in advance of trial. This was a heavily contested and extremely hard-fought discovery process, that undoubtedly would have required significant time and considerable additional costs to complete. Moreover, the remaining discovery, dispositive motions, and trial could well have extended the litigation by several years before the Class could recover any amount, even if Plaintiffs prevailed at every stage remaining. The anticipated time and expense to obtain a favorable resolution is another factor that supports approval of the Settlement.

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f. The Reaction of the Class Supports Final Approval.

To date, no Class members oppose the Settlement or have opted out of the Class. *See* Cavanaugh Decl., ¶18. The absence of objections raises a "strong presumption" that the terms are favorable to Class members. *See In re Facebook, Inc. Internet Tracking Litig*., Nos. 22-16903, 22-16904, 2024 WL 700985, at *1 (9th Cir. 2024) (unpublished); *see also Pickett*, 145 Wn.2d at 200-01 (finding only 50 objections out of 470,000 class notices sent was "de minimis" and "far smaller than that approved by federal courts in similar instances); *Clemans v. New Werner Co.*, No. 3:12-CV-05186, 2013 WL 12108739, at *5 (W.D. Wash. 2013) ("The scarcity of objections and requests to opt out of the Settlement both indicate the broad, class-wide support for the Settlement and support its approval."); *Pelletz v. Weyerhaeuser Co.*, 255 F.R.D. 537, 543–44 (W.D. Wash. 2009) (finding that three objections and 119 opt-outs of an "estimated 110,000 to 140,000 Class members" was evidence of "[t]he positive response to the Settlement by the Class").

The favorable reaction of Class members further supports approval of the Settlement.

g. The Presence of Good Faith and Absence of Collusion Support Final Approval.

"One may take a settlement amount as good evidence of the maximum available if one can assume that parties of equal knowledge and negotiating skill agreed upon the figure through arms-length bargaining[.]" *Ortiz v. Fibreboard Corp*., 527 U.S. 815, 852 (1999); *see also* Fed. R. Civ. P. 23(e)(2) advisory committee's note to 2018 amendment ("the involvement of a neutral or court-affiliated mediator or facilitator in negotiations may bear on whether they were conducted in a manner that would protect and further the class interests").

Class Representatives' Counsel and representatives for Defendants are highly experienced lawyers who zealously advocated for their clients' positions during their lengthy negotiations with and through the similarly experienced Mediator. The Settlement is unquestionably the product of arm's-length negotiations between experienced counsel, who are highly experienced in corporate and securities laws, providing further basis for its approval.

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2. The Plan of Allocation is Fair and Reasonable and Should be Approved.

Class Representatives also seek approval of the Plan of Allocation. The Plan of Allocation is set forth in full in the Notice provided to potential Class Members. *See* Cavanuagh Decl., Ex A. Assessment of a plan of allocation in a class action is governed by the same standards of review applicable to the settlement as a whole—the plan must be fair and reasonable. *See Class Plaintiffs v. Seattle*, 955 F.2d 1268, 1284 (9th Cir. 1992). "[A]n allocation formula need only have a reasonable, rational basis, particularly if recommended by experienced and competent" class counsel. *In re Zynga Inc. Sec. Litig.*, 2015 WL 6471171, at *12 (N.D. Cal. Oct. 27, 2015) (internal quotation and citation omitted). No objections to the Plan of Allocation have been filed to date. *Id.*, ¶18.

The Plan of Allocation provides an equitable basis to allocate the Net Settlement Fund among all Class Members who submit an acceptable Proof of Claim. The Plan of Allocation was developed by Class Representatives' Counsel with the assistance of their damages expert and follows the statutory framework for calculating damages under §11(e) of the Securities Act. Accordingly, Class Representatives respectfully submit that the Plan of Allocation is a fair and reasonable method for allocating the Net Settlement Fund among Authorized Claimants. *See* Jaconette Decl., ¶11.

D. Class Members Received the Best Notice Practicable

The Notice Plan, which was approved by the Court in the Preliminary Approval Order, was crafted with the purpose of providing the best notice practicable. *See* ECF No. 424. The Notice Plan commenced on March 4, 2025, and advised Class members of the essential terms of the Settlement, set forth the procedure for objecting to the Settlement or opting out of the Class, and provided specifics on the date, time, and place of the final approval hearing. *See* Cavanuagh Decl., Ex A. The Notice also included information regarding Class Representatives' Counsel's request for fees and thus fairly apprised Class members of their rights with respect to the Settlement and provided all necessary information for Class members to make informed

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decisions. *Id.* at 8. Thus, the notice procedures conform to due process requirements and support final approval. *See Nobl Park, L.L.C. of Vancouver v. Shell Oil Co.*, 122 Wash. App. 838, 846–47, 95 P.3d 1265, 1270 (Wash. Ct. App. 2004) (finding notice provided due process where it gave general notice of action, defined class members, and included details on opting out of class).

III. CONCLUSION

For the foregoing reasons, the Parties respectfully request that the Court grant final approval to the Settlement and Plan of Allocation.

DATED this 2nd day of May 2025.

Respectfully submitted,

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s/ Juli E. Farris

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I certify that this Memorandum contains 3372 words, in compliance with the Local Civil Rules.

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CERTIFICATE OF SERVICE

I hereby certify that on May 2, 2025, I caused to be served a true and correct copy of the foregoing on the following recipients via the method indicated:

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I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED this 2nd day of May 2025, at Seattle, Washington.

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